

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING**

77-2095

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LOUISE TODARO, ERNESTINE DAVIS, DEIDRA PLAIR,
PHYLLIS KLIPPEL, SYLVIA DAVIS, CLEO BACON,
IRIS CAPELLA, NAOMI BOSTICK, MARY REED, ALICE
TAVER, CAROL LEWIN, TAMMY GOLDSTON, MARGARET
GATLING, TONYA JACKSON, TRACYE CRAIG, BEVERLY
MASSEY, CARMEN GARCIA, HELEN LAVORE, GLORIA
TAGGART, MARTA HARDEE, ALTHEA MCDANIEL, RUTH
DOBSON, MADELINE PINEDA, JUDY WHEAT, BERNADETTE
BROWN, and EVELYN THORPL, on behalf of them-
selves and all other persons similarly situated,

Plaintiffs-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York
State Department of Correctional Services; IAN
LOUDON, Assistant Commissioner for Health
Services of the New York State Department of
Correctional Services: DAVID FROST, Southern
Regional Director of Health Services of the
New York State Department of Correctional
Services; FRANCES CLEMENT, Superintendent of
Bedford Hills Correctional Facility; HENRY
WILLIAMS, Health Services Director of Bedford
Hills Correctional Facility; ROBERT TSCHORN,
Surgical Consultant at Bedford Hills Correctional
Facility; and MARIE DALY, Nurse Administrator
at Bedford Hills Correctional Facility,
individually and in their official capacities,

Defendants-Appellants.

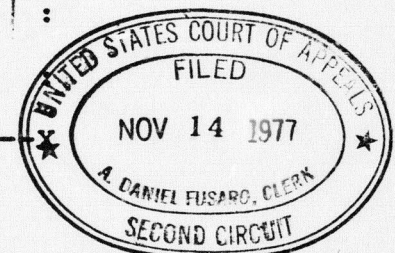
PETITION FOR REHEARING

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7657

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

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MS



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BENJAMIN WARD, Commissioner of the New York :
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Facility; and MARIE DALY, Nurse Administrator :
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individually and in their official capacities, :

Defendants-Appellants. :

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PETITION FOR REHEARING

Statement

Defendants-Appellants respectfully petition this
Court (Kaufman, Chief Judge, and Gurfein and Meskill, Circuit
Judges) for rehearing pursuant to Rule 40(a) of the Federal Rules

of Appellate Procedure of its decision dated October 31, 1977 which affirmed a judgment of the United States District Court for the Southern District of New York dated July 11, 1977 (Ward, D.J.).

Facts

After a lengthy trial, Judge Ward held certain aspects of the delivery of medical care at the Bedford Hills Correctional Facility (Bedford Hills) unconstitutional. The District Court ordered that the parties submit a report to the Court as to their progress in reaching agreement on new means and procedures for (1) providing better access to medical providers by inmates in sick wing (2) conducting sick call which provides adequate nurse screening and reasonably prompt access to a physician (3) insuring that ordered laboratory work is reported and followed up and medical reappointments are scheduled and (4) periodic self-audits of the performance of the medical care delivery system and record-keeping procedures conducive to such audits. Each side submitted proposed judgments to the District Court. Thereafter, on July 11, 1977, the District Court issued a judgment setting forth the procedures to be followed in the delivery of medical care at Bedford Hills.

Appellants in this motion seek a rehearing of the appropriateness of provision II(E) of this Judgment.

ARGUMENT

THE DISTRICT COURT EXCEEDED ITS JURISDICTION IN MANDATING PHYSICIAN ROUNDS ON SATURDAYS SINCE SUCH REQUIREMENT WILL LEAD TO A WASTE OF STATE RESOURCES AND, ADDITIONALLY, GOES WELL BEYOND THE UNITED STATES SUPREME COURT HOLDING THAT FEDERAL COURTS MAY ONLY INTERFERE WITH THE ADMINISTRATION OF A MEDICAL PROGRAM AT A CORRECTIONAL FACILITY TO PREVENT DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS.

Estelle v. Gamble, 429 U.S. 97 (1976).

Part II(E) (A-42) of the Judgment provides that physician rounds of sick wing must be conducted Monday through Saturday and that each inmate in sick wing must personally be seen by a licensed physician. However, the correctional facilities throughout the State are run on a five-day basis, i.e., generally each facility has a Health Services Director who is required to be at the facility Monday through Friday and on weekend call. In addition, depending on the facility, other physicians are employed on a part-time or fee for services cases.

At Bedford Hills, in addition to the Facility Health Services Director and the gynecologist, there are other physicians who provide services each day on a fee for services basis. At Bedford Hills, at the current time, one of these physicians happens to be at the institution on Saturday mornings to see patients. However, this is the exception rather than the rule statewide. The procedure at the correctional facilities generally is that on weekends, a physician is on call and a registered nurse is on the premises. Correction officers are trained in first aid. Insofar as Bedford Hills is concerned, the emergency room of the Northern Westchester Hospital is just five minutes from the correctional facility.

At the current time, there are only four beds in the sick wing at Bedford Hills.* The sick wing may house only one individual at any given time who has no more than a cold or who is simply feeling under the weather. There is really no medical need that this type of patient be seen personally by a physician on Saturday, as well as Monday through Friday, particularly where there is a registered nurse available. It is not the policy of the Department of Correctional Services to

* This will be increased to six beds as soon as two new beds arrive.

keep inmates at facilities who are in need of the kind of supervision that would require such intensive observation by a physician directly. These individuals are placed in hospitals. To leave this provision of the Judgment in effect as to Saturday physician rounds means that the Department of Correctional Services must purchase the services of a physician on the outside each Saturday to visit an inmate in sick wing when the medical condition of the inmate may not warrant such a house call.

Accordingly, appellants request that this provision of the Judgment be modified to provide for daily rounds by a physician Monday through Friday. At the very least, appellants would request that they be required to purchase the services of a physician for Saturday rounds only where the Facility Health Services Director determines that such a service is necessary for an inmate in sick wing.

CONCLUSION

THE JUDGMENT OF THE DISTRICT
COURT SHOULD BE AMENDED.

Dated: New York, New York
November 10, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

11/14/77

Copy received.

John Boston

